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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREGORY JEFFERSON,)	
)	
Petitioner,)	3:16-cv-00100-HDM-WGC
)	
v.)	ORDER
)	
ROBERT LEGRAND, et al.,)	
)	
Respondents.)	
)	
_____)	

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 4) comes before the court for consideration on the merits. Respondents have answered (ECF No. 8). Petitioner has not filed a reply, and the time for doing so has expired.

Background

On April 14, 2005, following a three-day jury trial, a jury convicted petitioner of multiple counts, including sexual assault, statutory sexual seduction, kidnapping, and pandering of a child, and a judgment of conviction was entered accordingly. (Exh. 5 (Tr. 10-11);

1 Exh. 6).¹ On appeal, the Supreme Court of Nevada reversed the
2 pandering conviction and one of the kidnapping convictions. (Exh. 7).
3 An amended judgment of conviction was entered on June 26, 2006. (Exh.
4 8).

5 Thereafter, petitioner filed a postconviction petition for writ
6 of habeas corpus in state court. (Exh. 9). Following an evidentiary
7 hearing, the trial court denied the petition. (Exhs. 14, 15 & 17).
8 On appeal, the Nevada Supreme Court affirmed. (Exh. 21). Petitioner
9 then filed the instant petition for writ of habeas corpus pursuant to
10 2254.

11 **Standard**

12 28 U.S.C. § 2254(d) provides the legal standards for this court's
13 consideration of the merits of the petition in this case:

14 An application for a writ of habeas corpus
15 on behalf of a person in custody pursuant to the
16 judgment of a State court shall not be granted
17 with respect to any claim that was adjudicated on
18 the merits in State court proceedings unless the
19 adjudication of the claim -

17 (1) resulted in a decision that was
18 contrary to, or involved an unreasonable
19 application of, clearly established Federal law,
20 as determined by the Supreme Court of the United
21 States; or

21 (2) resulted in a decision that was based
22 on an unreasonable determination of the facts in
23 light of the evidence presented in the State
24 court proceeding.

23 The AEDPA "modified a federal habeas court's role in reviewing
24 state prisoner applications in order to prevent federal habeas
25 'retrials' and to ensure that state-court convictions are given effect
26 to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-

27
28 ¹ The exhibits cited in this order, which comprise the state court
record, are located at ECF No. 9.

1 694 (2002). This court's ability to grant a writ is limited to cases
2 where "there is no possibility fair-minded jurists could disagree that
3 the state court's decision conflicts with [Supreme Court] precedents."
4 *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has
5 emphasized "that even a strong case for relief does not mean the state
6 court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer*
7 *v. Andrade*, 538 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*,
8 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a
9 difficult to meet and highly deferential standard for evaluating
10 state-court rulings, which demands that state-court decisions be given
11 the benefit of the doubt") (internal quotation marks and citations
12 omitted).

13 A state court decision is contrary to clearly established Supreme
14 Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state
15 court applies a rule that contradicts the governing law set forth in
16 [the Supreme Court's] cases" or "if the state court confronts a set
17 of facts that are materially indistinguishable from a decision of [the
18 Supreme Court] and nevertheless arrives at a result different from
19 [the Supreme Court's] precedent." *Andrade*, 538 U.S. 63 (quoting
20 *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v.*
21 *Cone*, 535 U.S. 685, 694 (2002)).

22 A state court decision is an unreasonable application of clearly
23 established Supreme Court precedent, within the meaning of 28 U.S.C.
24 § 2254(d), "if the state court identifies the correct governing legal
25 principle from [the Supreme Court's] decisions but unreasonably
26 applies that principle to the facts of the prisoner's case." *Andrade*,
27 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable
28 application" clause requires the state court decision to be more than

1 incorrect or erroneous; the state court's application of clearly
2 established law must be objectively unreasonable. *Id.* (quoting
3 *Williams*, 529 U.S. at 409).

4 To the extent that the state court's factual findings are
5 challenged, the "unreasonable determination of fact" clause of §
6 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v.*
7 *Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
8 that the federal courts "must be particularly deferential" to state
9 court factual determinations. *Id.* The governing standard is not
10 satisfied by a showing merely that the state court finding was
11 "clearly erroneous." *Id.* at 973. Rather, AEDPA requires substantially
12 more deference:

13 [I]n concluding that a state-court finding
14 is unsupported by substantial evidence in the
15 state-court record, it is not enough that we
16 would reverse in similar circumstances if this
17 were an appeal from a district court decision.
Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate
review, could not reasonably conclude that the
finding is supported by the record.

18 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also
19 *Lambert*, 393 F.3d at 972.

20 Under 28 U.S.C. § 2254(e)(1), state court factual findings are
21 presumed to be correct unless rebutted by clear and convincing
22 evidence. The petitioner bears the burden of proving by a
23 preponderance of the evidence that he is entitled to habeas relief.
24 *Cullen*, 563 U.S. at 181.

25 **Analysis**

26 The petition raises two grounds for relief. First, petitioner
27 asserts that his trial counsel was ineffective because he failed to
28

1 raise a "reasonable mistake of age" defense to the statutory sexual
2 seduction charges. Second, petitioner argues that his trial counsel
3 was ineffective because he failed to propose a jury instruction on
4 reasonable mistake of age.

5 Ineffective assistance of counsel claims are governed by the two-
6 part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984).
7 In *Strickland*, the Supreme Court held that a petitioner claiming
8 ineffective assistance of counsel has the burden of demonstrating that
9 (1) the attorney made errors so serious that he or she was not
10 functioning as the "counsel" guaranteed by the Sixth Amendment, and
11 (2) that the deficient performance prejudiced the defense. *Williams*
12 *v. Taylor*, 529 U.S. 362, 390-91 (2000) (citing *Strickland*, 466 U.S.
13 at 687). To establish ineffectiveness, the defendant must show that
14 counsel's representation fell below an objective standard of
15 reasonableness. *Id.* To establish prejudice, the defendant must show
16 that there is a reasonable probability that, but for counsel's
17 unprofessional errors, the result of the proceeding would have been
18 different. *Id.* A reasonable probability is "probability sufficient
19 to undermine confidence in the outcome." *Id.* Additionally, any
20 review of the attorney's performance must be "highly deferential" and
21 must adopt counsel's perspective at the time of the challenged
22 conduct, in order to avoid the distorting effects of hindsight.
23 *Strickland*, 466 U.S. at 689. It is the petitioner's burden to
24 overcome the presumption that counsel's actions might be considered
25 sound trial strategy. *Id.*

26 Ineffective assistance of counsel under *Strickland* requires a
27 showing of deficient performance of counsel resulting in prejudice,
28 "with performance being measured against an objective standard of

1 reasonableness,. . . under prevailing professional norms." *Rompilla*
2 *v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
3 omitted).

4 If the state court has already rejected an ineffective assistance
5 claim, a federal habeas court may only grant relief if that decision
6 was contrary to, or an unreasonable application of, the *Strickland*
7 standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is
8 a strong presumption that counsel's conduct falls within the wide
9 range of reasonable professional assistance. *Id.*

10 The United States Supreme Court has described federal review of
11 a state supreme court's decision on a claim of ineffective assistance
12 of counsel as "doubly deferential." *Cullen*, 563 U.S. at 189. The
13 Supreme Court emphasized that: "We take a 'highly deferential' look
14 at counsel's performance. . . . through the 'deferential lens of §
15 2254(d).'" *Id.* at 190 (internal citations omitted). Moreover,
16 federal habeas review of an ineffective assistance of counsel claim
17 is limited to the record before the state court that adjudicated the
18 claim on the merits. *Id.* at 181-89. The United States Supreme Court
19 has specifically reaffirmed the extensive deference owed to a state
20 court's decision regarding claims of ineffective assistance of
21 counsel:

22 Establishing that a state court's application of
23 *Strickland* was unreasonable under § 2254(d) is
24 all the more difficult. The standards created by
25 *Strickland* and § 2254(d) are both "highly
26 deferential," *id.* at 689, 104 S.Ct. 2052; *Lindh*
27 *v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
28 2059, 138 L.Ed.2d 481 (1997), and when the two
apply in tandem, review is "doubly" so, *Knowles*,
556 U.S. at ----, 129 S.Ct. at 1420. The
Strickland standard is a general one, so the
range of reasonable applications is substantial.
556 U.S. at ----, 129 S.Ct. at 1420. Federal
habeas courts must guard against the danger of

1 equating unreasonableness under *Strickland* with
2 unreasonableness under § 2254(d). When § 2254(d)
3 applies, the question is whether there is any
reasonable argument that counsel satisfied
Strickland's deferential standard.

4 *Harrington*, 562 U.S. at 105. "A court considering a claim of
5 ineffective assistance of counsel must apply a 'strong presumption'
6 that counsel's representation was within the 'wide range' of
7 reasonable professional assistance." *Id.* at 104 (quoting *Strickland*,
8 466 U.S. at 689). "The question is whether an attorney's
9 representation amounted to incompetence under prevailing professional
10 norms, not whether it deviated from best practices or most common
11 custom." *Id.* at 105 (internal quotations and citations omitted).

12 Petitioner raised both of his claims before the Nevada Supreme
13 Court on appeal of the denial his postconviction habeas petition. The
14 Nevada Supreme Court rejected the claim relating to the jury
15 instruction as follows:

16 [A]ppellant Gregory Jefferson argues that the
17 district court erred in denying his claim that
18 trial counsel was ineffective in failing to
19 request a jury instruction on reasonable mistake
20 of age. To prove ineffective assistance of
21 counsel, a petitioner must demonstrate that
22 counsel's performance was deficient in that it
23 fell below an objective standard of
24 reasonableness, and resulting prejudice such that
25 there is a reasonable probability that, but for
26 counsel's errors, the outcome at trial would have
27 been different. *Strickland v. Washington*, 466
28 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100
Nev. 430, 432-33, 683 P.2d 504, 505 (1984)
(adopting the test in *Strickland*). Both
components of the inquiry must be shown,
Strickland, 466 U.S. at 697, and the petitioner
must demonstrate the underlying facts by a
preponderance of the evidence, *Means v. State*,
120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We
give deference to the district court's factual
findings if supported by substantial evidence and
not clearly erroneous but review the court's
application of the law to those facts de novo.
Lader v. Warden, 121 Nev. 682, 686, 120 P.3d

1164, 1166 (2005).

Jefferson argues that counsel was ineffective for failing to request a jury instruction on the theory that reasonable mistake of age is a defense to statutory sexual seduction (NRS 200.364(6)). Jefferson has failed to demonstrate deficiency or prejudice. As Jefferson conceded below, this court has held that a reasonable mistake as to the victim's age is not a defense to statutory sexual seduction. See *Jenkins v. State*, 110 Nev. 865, 870-71, 877 P.2d 1063, 1067 (1994). Further, while the defense is entitled to a jury instruction on its theory of defense, that theory must be supported by some evidence and it must be an accurate statement of law. *McCraney v. State*, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994); *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). Here, it was not the theory of defense (that the State failed to meet its burden of proof), Jefferson identifies no evidence that would support such a theory, and it is not an accurate statement of law. It would therefore have been a futile request, and counsel was not objectively unreasonable in not making it. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Moreover, Jefferson has failed to demonstrate a reasonable probability of a different outcome at trial where he was also convicted of the alternate, greater offenses of sexual assault of a child under 16 years.

(Exh. 21). The Nevada Supreme Court did not address petitioner's related claim that counsel was ineffective for failing to pursue a reasonable mistake of age defense to the statutory sexual seduction charges.

Both of petitioner's assertions of ineffective assistance of counsel are without merit. Nevada law was clear at the time of petitioner's trial that "reasonable mistake of age" was not a defense to statutory sexual seduction. *Jenkins v. State*, 877 P.2d 1063, 1067 (Nev. 1994). Counsel's decision not to pursue a clearly unavailable defense and instruction did not therefore fall below an objective standard of reasonableness. Nor has petitioner established that it caused him prejudice. There is no reasonable probability that the

1 state trial court would have offered an instruction on reasonable
2 mistake of age when the law clearly precluded such a defense. For
3 those reasons, the Supreme Court of Nevada's rejection of petitioner's
4 ineffective assistance of counsel claim with respect to the failure
5 to seek a jury instruction was not objectively reasonable, and
6 petitioner is not entitled to relief with respect to his claim that
7 counsel failed to pursue a reasonable mistake of age defense. The
8 petition for writ of habeas corpus must therefore be denied.

9 **Certificate of Appealability**

10 In order to proceed with an appeal, petitioner must receive a
11 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
12 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th
13 Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52
14 (9th Cir. 2001). Generally, a petitioner must make "a substantial
15 showing of the denial of a constitutional right" to warrant a
16 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v.*
17 *McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must
18 demonstrate that reasonable jurists would find the district court's
19 assessment of the constitutional claims debatable or wrong." *Id.*
20 (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
21 inquiry, the petitioner has the burden of demonstrating that the
22 issues are debatable among jurists of reason; that a court could
23 resolve the issues differently; or that the questions are adequate to
24 deserve encouragement to proceed further. *Id.* When the defendant's
25 claim is denied on procedural grounds, a certificate of appealability
26 should issue if the petitioner shows: (1) "that jurists of reasons
27 would find it debatable whether the petition states a valid claim of
28 the denial of a constitutional right"; and (2) "that jurists of reason

1 would find it debatable whether the district court was correct in its
2 procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

3 This court has considered the issues raised by petitioner, with
4 respect to whether they satisfy the standard for issuance of a
5 certificate of appealability, and determines that none meet that
6 standard. The court will therefore deny petitioner a certificate of
7 appealability.

8 **Conclusion**

9 In accordance with the foregoing, IT IS ORDERED that the petition
10 for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 4) is
11 hereby DENIED on its merits, and this action is DISMISSED with
12 prejudice.

13 IT IS FURTHER ORDERED that a certificate of appealability is
14 DENIED.

15 The Clerk of the Court shall close this action and enter final
16 judgment accordingly.

17 IT IS SO ORDERED.

18 DATED: This 30th day of March, 2018.

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HOWARD D. MCKIBBEN
22 UNITED STATES DISTRICT JUDGE
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